

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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Amendment of Part 90 of the)	
Commission's Rules to Provide)	
for the Use of the 220-222 MHz)	PR Docket No. 89-552
Band by the Private Land Mobile)	RM-8506
Radio Service)	
Implementation of Sections 3(n) and 332)	
of the Communications Act)	GN Docket No. 93-252
Regulatory Treatment of Mobile Services)	
Implementation of Section 309(j) of the)	
Communications Act -- Competitive)	PP Docket No. 93-253
Bidding, 220-222 MHz)	

COMMENTS OF THE WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF), hereby submits these comments in response to the Third Notice of Proposed Rulemaking portion of the above-captioned proceeding as published in the Federal Register regarding the disposition of certain applications for private mobile radio services. 60 Fed. Reg. 46564 (Sept. 7, 1995). Because of the relatively short comment period provided in this proceeding, these comments by WLF are of a general nature and may be modified or supplemented within the reply comment period which ends on October 12, 1995.¹

¹ WLF understands that the Commission has denied a request to extend the September 27, 1995 comment period. While we believe that an extension of time was warranted, we urge the Commission to at least extend the reply comment period for a minimum of an additional 14 days. Such an extension will give interested parties and the public a better opportunity to submit

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WLF is a national non-profit public interest law and policy center based in Washington, D.C., with over 100,000 supporters nationwide. WLF has regularly participated in rulemaking proceedings before a number of federal agencies, including the Federal Communications Commission (FCC), as well as in litigation challenging the validity of agency rules or decisions. In those proceedings, WLF has generally opposed agency rules that impose unnecessary burdens on the regulated community, as well as those agency rules or policies that treat the regulated community unfairly. WLF also has opposed excessive regulation on the grounds that such regulations necessarily increase the cost of doing business, and hence, increase the price of goods and services which the consumer must ultimately bear.

In that regard, WLF notes that the FCC's "primary goal in this proceeding is to establish a flexible regulatory framework that will allow for more efficient licensing of the 220-222 MHz band, eliminate unnecessary regulatory burdens on both existing and future licenses, and enhance the competitive potential of the 220 MHz service in the mobile services marketplace." 60 Fed. Reg. 46564 (Sept. 7, 1995). While WLF applauds the FCC's goal to "eliminate unnecessary regulatory burdens," WLF has grave concerns with respect to the FCC's proposal to abandon the current lottery system, return the pending mutually exclusive, non-commercial, nationwide applications for the private mobile

their views and, concomitantly, would enable this Commission to make a more informed decision on this matter.

radio services, and to award the licenses through competitive bidding or auction.

While an auction will obviously generate revenue, there are important equitable and legal concerns in this case that suggest that the current lottery system should not be abandoned. In particular, the 34 applicants who duly filed their respective applications for the non-commercial nationwide licenses under Commission rules and procedures in 1991, did so with the understanding and expectation that their mutually-exclusive applications would be disposed of by lottery. They made the business decision to forego making other applications for different spectrums with this lottery system in mind. More importantly, numerous other applicants for the commercial 220 MHz licenses did have their applications disposed of by lottery. Thus, only these 34 remaining applications for the non-commercial nationwide licenses are being singled out unfairly for different treatment with respect to their applications.

While it is true that in 1993, Congress provided the FCC with the discretion to award licenses by auction, these 34 applications have been pending since 1991. Through no fault of the applicants, these applications have been allowed to languish over the last several years due to delays caused by the FCC. If these applications were considered in a timely manner, they would have been acted upon by lottery before mid-1993. In any event, the FCC should use its discretion as it has done so before and promptly order that these applications be disposed of by the

lottery system. See, e.g., Cellular Unserved Areas, 9 FCC Rcd 7387 (1994). In that decision, the Commission noted that Congress recognized the equities involved with respect to license applications on file before July 26, 1993, when the law was changed, and concluded that "the public interest would best be served by using the statutory lottery procedures" in that case. Id. at 7390. Those same equitable concerns are present in this case.

Furthermore, as noted earlier, more than application fees are at stake for the applicants. The applicants appear to have reasonably relied on the prospect that their applications would be disposed of by lottery, and thus, forbore submitting other applications there were in fact disposed of by lottery. The applicants have also invested additional resources in order to meet other qualifications that were subsequently added by the FCC for this particular 220 MHz service after the filing deadline in 1991. In that regard, the applicants did have certain investment-backed expectations and an implied, if not expressed, understanding as to the manner in which their applications would be acted upon. Accordingly, if the Commission were to renege on that understanding, even though authorized by Congress, the applicants may be entitled to damages. Cf. Winstar v. United States, No. 92-5164 (Fed. Cir. Aug. 30, 1995).

In sum, WLF believes that a change from the lottery system to an auction in this particularly proceeding is not warranted and would punish the applicants for no wrongdoing on their part.

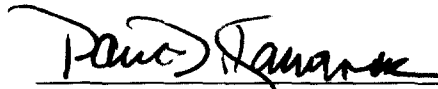
CONCLUSION

For the foregoing reasons and those that WLF may provide in any reply or supplemental comment, WLF urges the Commission not to abandoned the current lottery system for these 34 applications.

Respectfully submitted,



Daniel J. Popeo
General Counsel



Paul D. Kamenar
Executive Legal Director

Date: September 27, 1995